No. 2678

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

M. F. HALL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR

T. C. WEST,
LEROY TOZIER,
Attorneys for Plaintiff in Error.

WEST, RAFAEL & CURLEY,
Of Counsel.

Filed this.....day of June, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

BENAS & GILHOOLY, 509 SANSOME ST.

No. 2678

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

M. F. HALL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR

Statement of Case

This is a writ of error to the United States District Court for the Territory of Alaska, Fourth Division, sued out by the defendant, M. F. Hall, to reverse a conviction against him given by a jury in the above division.

The defendant was indicted by the Grand Jury of the crime of assault, as follows:

That the said M. F. Hall, on the 24th day of September, A. D. 1914, at the town of Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this Court, not being armed with a dangerous weapon, did then and there unlawfully assault one, Selma Lappi, by then and there unfastening some of the underclothing of the said Selma Lappi and then and there placing his hand upon the private parts of the body of the said Selma Lappi, the said Selma Lappi being then and there a female child of the age of nine years and he, the said M. F. Hall, being then and there a male person over the age of twenty-one years, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

The defendant is a man of over fifty years of age, and is a physician and surgeon practicing his profession at the town of Fairbanks, Territory of Alaska.

The plaintiff in error will rely upon the following Amended Assignment of Errors.

Amended Assignment of Errors on Writ of Error

The defendant below and plaintiff in error, in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon trial of the action, to-wit:

I.

The Court erred in admitting the evidence of the witness, Charlotte Geis, who testified that she visited the offices of the defendant about thirty-four months before the offense alleged in the indictment herein and that defendant committed then and there an assault upon her person in the same way and manner as that alleged in the indictment herein to have been committed upon the person of Selma Lappi, the complaining witness therein, by taking the said Charlotte Geis upon his lap and placing his hand upon her sexual organs, and in particular that part of the evidence of the said Charlotte Geis, as follows:

Q. How did you happen to go to Dr. Hall's office that time, Charlotte?

A. I went—(cries)—I went with my brother when he had a cut.

Q. Where was your brother cut, Charlotte?

A. (No answer, witness crying.)

Mr. Stevens: The defendant objects to the question and the testimony of this witness; first, for the reason that the witness has not shown herself to be competent to appreciate the obligation of an oath; second, that the testimony is immaterial, irrelevant, incompetent and impertinent for any purpose, as it does not appear that Selma Lappi was present at the time or any other person except

Dr. Hall and the brother Charles; the time is not definitely fixed, and there can be no object in the testimony to be conceived by the defendant at this time, excepting an attempt on the part of the prosecution to prejudice the minds of the jury by offering some testimony that is wholly improper. I can only anticipate the object at this time. Certainly the question he asks, whether preliminary or not, is subject to the objection that I have just made.

(The objection was overruled by the Court, and the defendant reserves an exception, which exception is allowed.)

Mr. Roth: Q. What was the matter with Charlie at that time?

A. He had a cut in the forehead.

Q. Did you leave Dr. Hall's office when Charles left? A. No.

Q. How did you come to not leave?

Mr. Stevens: We object for the reason made to the question last objected to, and for the further reason that no testimony of the nature sought to be given by this witness is competent, for the reason that any conduct, whether proper conduct or improper conduct, upon the part of Dr. Hall towards this child, is wholly inadmissible under the laws, being a different person from that alleged in the

indictment; for the further reason that the testimony is too remote, and there has been no showing upon the part of the Government that it is connected directly or indirectly with the offense charges in the indictment.

THE COURT: What is the purpose of the testimony, Mr. Roth?

MR. ROTH: The purpose of the testimony (interrupted).

MR. MARQUAM: We object unless it appears to the Court that it is clearly admissible, we object to counsel stating the purpose of it in the presence of the jury, for the damage is done if counsel makes the statement.

THE COURT: Objection overruled. (Defendant saves an exception, which exception is allowed.)

MR. ROTH: Q. How did you come not to leave Dr. Hall's office when Charles left?

A. I was sitting in his lap, in Dr. Hall's lap (interrupted).

MR. STEVENS: We desire to be understood that our same objections go to all this testimony.

THE COURT: For the reasons heretofore assigned?

MR. STEVENS: Yes. And we desire an exception to the ruling of the Court allowing it to go on.

MR. ROTH: For the purpose of obviating the necessity of interrupting the witness, the prosecution is willing to stipulate that the objection heretofore made to the questions is made to all of the testimony to be given by this witness, and that an exception is taken and an exception allowed.

THE COURT: Very well.

MR. ROTH: Q. You just stated that you were sitting in Dr. Hall's lap. What did Dr. Hall say?

A. When my brother went, he said, "Sister, are you coming?"

Q. Yes, all right.

A. And the doctor said, "No, she is going to stay here a little while."

Q. All right, then, did your brother go away?

A. Yes.

Q. Was the office door open or was it shut, after your—

A. I think it was shut.

Q. What kind of underclothes did you have on?

A. I didn't have any on.

Q. What kind of clothes were you wearing at that time?

A. Bloomers.

Q. How were the bloomers fastened around the legs here (indicating). A. With elastic.

Q. What did Dr. Hall do after your brother left?

A. Put his hand up under my bloomers.

Q. Where did he put his hand, Charlotte? Did he put it up here (indicating)? A. Yes.

Mr. Marquam: We object to that and wish the record that at the time counsel is asking the question he is going through motions with his hands and indicating (interrupted).

The Court: Objection sustained.

Mr. Marquam: We ask that counsel be warned not to repeat a performance of that kind.

The Court: Of course, Mr. Roth, you will not illustrate what the child may testify to. You should be governed entirely by what the answer of the child is.

Mr. Roth: It is extremely difficult to require a child to mention names. That was why I put the question the way I did.

Mr. Stevens: And that was wholly improper.

Mr. Roth: Q. Where did Dr. Hall put his hand when he put it up under your bloomers?

A. He put it on—

Q. Tell us where he put his hand.

A. Put it right down here (indicating).

Q. Did he do anything with his finger?

A. Yes. (Cries.)

Q. Where did he put his finger?

A. Right here (indicating). (Cries.)

Q. Did he put it inside? A. Yes.

Q. Charlotte, let me ask you this question. What did he do with his finger after he put it inside?

A. Around like this (showing).

Q. Did he say anything to you? A. No.

Q. After that what did he do, Charlotte?

A. Nothing.

Q. How long did you stay there?

A. Not very long.

Q. Did Dr. Hall say anything to you at all?

A. I don't remember of him ever saying a thing.

Q. Was Dr. Hall treating you at that time for anything?

A. Yes, I had—no.

Q. Had he treated you before?

A. Not for any other thing, but one time I had a sty on my eye and he fixed that.

Q. How long before?

A. I don't remember.

Q. But at this time that you went there with Charles, was Dr. Hall treating you at that time?

A. No.

Mr. Roth: You may cross-examine.

CROSS-EXAMINATION.

By MR. MARQUAM: At this time we move that all the testimony of the witness, Charlotte Geis, be stricken for the reason that the same is irrelevant, incompetent and immaterial, and neither tending to prove or disprove any element of the offense charged, and is not shown to have happened within such time as could throw any light upon any element of the offense charged, and is in no way connected with this case.

(The motion is denied. Defendant saves an exception, which exception is allowed.)

II.

The Court erred in denying the motion of defendant made at the close of the testimony of said Charlotte Geis, to strike out all the testimony of the said witness relating to a prior and independent alleged offense committed upon the said Charlotte Geis, similar to the offense alleged in the indictment herein, which motion being by the Court denied was duly excepted to as to said denial, by the defendant and exception allowed by the Court.

III.

That the Court erred in giving and reading to the jury instruction numbered fourteen, as follows:

14.

You are instructed that, as a matter of law, when the defendant testified as a witness in this case, he became as any other witness, and his credi-

bility is to be tested and subjected to the same tests as are applied to any other witness. And, in determining the degree of credibility that shall be accorded to his testimony, you have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness stand during the trial, and you may also take into consideration the fact—if such be the fact—that he has been contradicted by other witnesses. And you are further instructed that if, after considering all the evidence in the case, you find that the defendant has willingly and wrongfully testified falsely to any fact material to the issue in the case, you have the right to entirely disregard his testimony, except so far as his testimony is corroborated by other creditable testimony.

IV.

The Court erred in denying the motion of defendant in arrest of judgment, to which defendant duly excepted and exception allowed by the Court.

V.

The Court erred in denying the motion for a new trial duly made by the defendant, to which denial the defendant duly excepted and exception allowed by the Court.

VI.

The Court erred in pronouncing sentence and rendering judgment against the defendant.

Argument

The first assignment of error is taken upon the ground that the Court erred in admitting the evidence of the child Charlotte Geis, upon two grounds. First, it was not shown that the child appreciated the obligations of an oath, and second, that the evidence was altogether inadmissible under any circumstances of the case, and was too remote.

This little girl was only nine years of age (Transcript of Record pp. 150-151). It is quite evident that she did not understand the consequences that might follow if she swore falsely, because when asked the following question: "Q. Do you know in what way you might be punished?", she nodded her head in the negative (Transcript p. 151), and it was not until the learned District Attorney put the following leading question that she finally stated that she did know the consequences that would follow in case she testified falsely:

Q. Do you understand that a person that would tell an untruth after he takes an oath to tell the truth might go to jail?

A. Yes.

Q. Do you realize that a person might go to jail if he swore falsely?

The Court to Witness: Instead of shaking your head, say yes or no.

A. Yes.

It is submitted that it was not shown that this child realized to a sufficient degree the sancity of an

oath that would warrant her testimony being admitted in a criminal case, and especially one so serious in its consequences as the case at bar.

The second objection raised to the testimony of this child seems so clear that it scarcely needs argument; namely, that the testimony was inadmissible, and too remote.

Of course, the writer is mindful of the fact of the rule of law that permits evidence of similar offenses committed about the same time being admitted against a defendant in a criminal case, but those cases are generally cases showing some method under which an accused has been accustomed to act in furtherance of a general plan to commit crime, such as the use of the mails for purposes of defrauding; the making or having in possession counterfeiting tools, and cases of like nature, but the law is quite clear that unless the evidence tends to show the commission of a similar offense, showing the method of the accused, it ought not to be admitted. For instance, if a person were accused of murder it would not be contended for a moment that evidence of another murder committed at a previous time by the accused would be admissible under any theory of a murder trial, and again, in case of a man being charged with assault evidence would not be admissible that on a previous occasion he had assaulted someone else. And the evidence given by this little girl, if it was evidence at all, was evidence of another assault, but beyond and above this objection, the evidence was clearly in-

admissible on the ground that it was too remote. The trial of this cause took place in the middle of April, 1915, and the assault that Charlotte Geis testifies to was committed thirty-two months before, or in August, 1912. Surely evidence of a somewhat similar offense committed thirty-two months before the offense charged in the indictment could not under any stretch of the rule under discussion be admitted. For authorities on this point counsel for the plaintiff in error refers the Court to the following:

People vs. *Molineux,* 62 L. R. A. 193 and notes thereunder. It would seem in reading the notes in this case that in any case in which evidence of a similar offense is admitted it must be not only *about the time of the crime charged,* but also must in some way tend either to prove the crime charged or show or tend to prove guilty knowledge. Under an indictment charging the defendant with assault to commit rape, evidence that he on previous occasions had assaulted the prosecutrix was held to be admissible, but evidence that he had assaulted another female with the same intent was held to be incompetent. See notes to above case at page 299. It must be remembered that the evidence given by Charlotte Geis was evidence of a crime committed thirty-two months before.

See also

12 Cyc., pp. 405 and 411.

The second assignment of error is predicated upon the refusal of the Court to grant the de-

fendant's motion to strike out the evidence of the witness Charlotte Geis and needs no further argument, because if the evidence was inadmissible, as contended herein, the motion to strike it out should of course have been granted.

In the third assignment of error, the defendant complains of the instruction given by the trial judge with relation to this testimony inasmuch as it seems to particularly point out the defendant's testimony and distinguish it from that of the other witnesses in the case, especially the latter part of the instruction, as follows:

"You are further instructed that if after considering all the evidence of the case you will find that the defendant has willfully and wrongfully falsely to any fact material to the issue in the case, you have the right to entirely disregard his testimony except so far as his testimony is corroborated by other and creditable testimony."

It is respectfully submitted that the verdict of guilty be set aside and the defendant granted a new trial.

Respectfully submitted,

T. C. West,
Leroy Tozier,
Attorneys for Plaintiff in Error.

West, Rafael & Curley,
Of Counsel.